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ABSTRACT

Promotion and tenure decisions in higher education are discussed and identified as no longer private affairs within departments, but subject to affirmative action guidelines and court scrutiny. Increasing numbers of discrimination complaints are forcing committee members to justify publicly decisions that were once left to their private discretion. Reasons for this important change include the 1972 amendment to Title VII of the Civil Rights Act of 1964 extending to colleges and universities the law's prohibition of employment discrimination on the basis of race, sex, or religion. Though many institutions of higher education have accordingly hired women and minorities, tenure and promotion awards are slow, prompting alleged discrimination suits. A recent study by the National Research Council found discrimination is indeed a cause. The judicial process of discovery (the right of someone involved in litigation to gather evidence) is explained. The Dinnan and Gray court cases are discussed as examples. Further examples are provided to explain how to establish assessment criteria and a prima facie case. Other topics covered include uniform guidelines on employee selection procedures, out-of-court settlements, recent court decisions in discrimination cases, and constitutional due process. A checklist for faculty evaluation process provides 10 suggestions (e.g., written procedures, formal appeal system). Contains 10 references. (SM)

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Center for Faculty Evaluation & Development
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SEPTEMBER 1984 KANSAS STATE UNIVERSITY

COURT CHALLENGES TO TENURE, PROMOTION, AND RETENTION DECISIONS

by
Peter Seldin
Pace University

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The Right of "Discovery"

The Dinnan Case

In appealing the Circuit Court's decision to the Supreme Court, Dinnan said he was trying to win a ruling that would protect members of tenure committees from lawsuits. He argued that faculty members would refuse to serve on tenure committees without such protection and that the integrity of the academic process would be undermined if the confidentiality of the votes were breached. However, the decision handed down in the fall of 1981 by the three-judge panel of the Eleventh Circuit (as reprinted in Test of Appeals Court, Chronicle of Higher Education, November 25, 1981, p. 14) said:

> We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions.
> If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure-decision-making process.
> However, once he accepted such a role of public trust, he subjected himself to explaining to the public and any affected individual his decisions and the reasons behind them.

The court rejected the idea that professors would be inhibited in making tenure decisions if they had to reveal their votes, saying:

> We fail to see how, if a tenure committee is acting in good faith, our decision today will adversely affect its decision-making process.
> Indeed, this opinion should work to reinforce responsible decision-making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind 'academic freedom' to avoid resonsibility for their actions.

In essence, the court found that society's interest in due process and affirmative action transcends higher education's interest in academic freedom and confidentiality.

The Gray Case

While the collective decisions of peer review bodies are made known, only rarely are the votes of individual members disclosed. More important, it is uncommon for candidates to be given specific reasons for a negative academic judgment. Some institutions maintain that such a bar of silence is better for the individual involved. A policy statement adopted in 1967 by the Board of Higher Education of the City of New York asserted that the giving of reasons "is really not in the best interest of the candidate himself, for it makes a matter of record a negative evaluation which may come back to plague him later" (Personnel and Budget Procedures, 1967, p. 2). A similar posture was adopted by a large, mid-western university which informed new faculty members that: "It shall not be necessary for the dean or department chairman to provide any causes or reasons for not recommending reappointment" (Balch, 1980, p. 26). This blanket of confidentiality increases the suspicions of many professors given negative personnel decisions that they are victims of discrimination.

Should a professor who wants to know the reasons for a negative personnel decision still not be told? That question is at the heart of the case of S. Simpson Gray v. The City University of New York (LaGuardia Community College). Professor Gray taught business courses for five years at LaGuardia Community College. He was denied tenure and reappointment for the 1979-80 academic year. In his view, the decision was discriminatory and the black instructor filed suit under the Civil Rights Act. He sought background information on the individual votes of the tenure committee. Two members refused, citing academic freedom and confidentiality.

District Judge Lawrence Pierce came down on the side of the two committee members, ruling that protecting confidentiality in tenure decisions is essential to preserving academic freedom. Gray appealed the decision. The Court of Appeals overturned the ruling and decided that individual members of the committee could legally be compelled to reveal how they voted if possible evidence that Gray was the victim of racial discrimination.

The Court of Appeals' decision implied that colleges and universities are expected to be more forthright in providing unsuccessful candidates with reasons for their rejection, especially when discrimination is at issue. The court granted Gray's motion because he had received no reasons for his rejection and had therefore been forced to "chase an invisible quarry" in trying to prove discrimination. The court's decision walked a tightrope between the plaintiff's right of discovery and academic right of confidentiality. "Rather than adopting a rule of absolute disclosure in reckless disregard of the need for confidentiality," the court said, "or adopting a rule of complete privilege that would frustrate reasonable challenges to the fairness of a hiring decision, our statement today holds that absent a statement of reasons, the balance tips toward discovery and away from recognition of privilege."

The Dinnan and Gray cases provide evidence that the courts are departing from the traditional reluctance to inject themselves into academic decisions.

Establishing the Assessment Criteria

Historically, the courts have exhibited a distaste for overturning administrative decisions unless arbitrarily, capriciously, or irrelevantly based. The assumption is that due process is served unless the evidence against that assumption is overwhelming. Thus, the courts are generally disinterested in the particular methods or criteria employed in faculty evaluations. Kaplan (1978, p. 129) finds that the courts are "less likely to become involved in disputes concerning the substance of standards and criteria than in disputes over procedures for enforcing standards and criteria." Specifically, the courts are loath to supplant academic judgments with judicial judgments with regard to sources of information, types of ratings, and relative weights assigned to criteria in promotion and tenure decisions.

A case in point is Goolsby v. Regents of University of Georgia (Civil Action no. C-11236 Super. Ct. Fulton County, Georgia, 1976). The presiding judge ruled that the criteria used "in performance evaluation relating to professors' promotions and salary increases involve judgmental decisions which are, at best, difficult and in the court's opinion are best left to those entrusted to make the same, i.e., college administrators." In Green v. Board of Regents, Texas Tech University (335 F. Supp. 249, 1971), in the Court of Appeals, the judge concluded that evaluating the criteria selected by the university was necessarily judgmental and the court refused to substitute equity judgment for that of the educational experts.

Although the courts tend to steer clear of dictating the criteria or standards colleges and universities should use in determining faculty performance, they have intervened in three areas of dispute.

(1) When evaluation criteria are spelled out in the faculty handbook or institution's by-laws, thus becoming part of the legal contract between institution and faculty member, and the procedures are not followed. (For example, students are not called upon to provide formal input to the determination of faculty teaching effectiveness, despite the requirement that they do so as listed in the faculty handbook.)

(2) When evaluation criteria are specific and/or are not job-related. (For example, tenure is denied to a faculty member on the basis of appearance, neatness, or sense of humor.)

(3) When a charge of discrimination is filed against an institution under federal or state statutes. In this case, the agencies charged with enforcement of the statutes are concerned with all procedures used to determine tenure, promotion, and dismissal. These agencies analyze performance appraisal based on the use of observation and ratings, interviews, and written tests of information which may relate directly to the evaluation of faculty performance. To overcome charges of discrimination on the basis of race, sex, or ethnic group, colleges and universities must be able to demonstrate that discrimination played no part in the personnel decision.

Establishing a Prima Facie Case

Under Title VII of the Civil Rights Act, the aggrieved professor has the initial burden of presenting prima facie evidence of a specific discriminatory act. One way to establish such evidence is to demonstrate that the criteria used to evaluate performance are unevenly applied or are biased and fatally subjective. Another is to demonstrate the statistical disparity of male and female faculty—say, at associate professor rank. Once a prima facie case is established, the burden of proof shifts to the institution which must present nondiscriminatory reasons to explain away the differences.

Although most discrimination suits are filed under Title VII of the Civil Rights Act, some are brought under the due process clause of the Fifth Amendment and a few under the Equal Protection clause of the Fourteenth Amendment. The suits filed on Constitutional grounds require the complainant to show "intent to discriminate," which is not required under Title VII. In the latter case, only the impact of a challenged promotion or tenure practice needs to be shown. "Intent to discriminate" is far more difficult to prove than "impact."

Uniform Guidelines on Employee Selection Procedures

The Equal Employment Opportunity Commission (EEOC) was created by the federal government to put teeth into Title VII. This commission has published a series of guidelines (Uniform Guidelines on Employee Selection Procedures, 43 Federal Register 38290) to provide factual information to those involved in the selection and evaluation of personnel. Since the guidelines are used by the courts in resolving promotion and tenure disputes, they should be carefully studied and followed, both in spirit and letter, to erase even the suspicion of discrimination. The guidelines apply to all methods used to make personnel decisions including written tests, interviews, work samples, and performance ratings.

Evaluation methods should be validated in accordance with the guidelines whenever possible in order to avoid possible adverse effects on racial, sexual, or ethnic groups. Although such validation is always desirable, the guidelines mandate it only when an assessment method may adversely affect the opportunities of these groups. If a group receives generally lower student ratings, for example, a member of that group can claim that the ratings unduly biased his/her opportunity for promotion. The institution would then have to demonstrate the validity of the ratings as an assessment of job performance. The evidence needed to defend the validity of the assessment method should be considered before the method is implemented. Any rating scale or evaluation system that includes criteria irrelevant to the job (e.g., "neatness") is probably headed for trouble in court.

Out-of-court Settlements

Accompanying the sharp increase in sex discrimination cases is a comparably sharp increase (now perhaps a majority) of cases settled out of court. Institutions settle cases out of court for two basic reasons: the fear that the case will be lost, and a desire to avoid the publicity that accompanies the public charge of discrimination. In settling out of court, the institution usually denies any wrong doing.

During and a few months after the spring of 1983, each of the following was reported settled in The Chronicle of Higher Education: The University of the District of Columbia agreed to promote an Hispanic faculty member from associate to full professor and provide him with $11,500 in back pay. The University of Minnesota agreed to pay 37 female librarians $250,000 in back pay and fringe benefits in a sex discrimination settlement, and The University of Oregon agreed to reform its formal plan for affirmative action and pay her $50,000 to settle her charges of race and sex discrimination.

Recent Court Decisions in Discrimination Cases

The courts in recent years have ruled many colleges and universities in violation of law in an array of decisions and penalties. Some institutions have been ordered by the courts to reverse personnel decisions. For example, a federal appellate court in 1980 ordered Muhlenberg College in Pennsylvania to award tenure to a physical education professor after finding that she was turned down because she was female.

Other recent court decisions have supported colleges and universities which have been sued by faculty members. A lower court ruled that the University of Texas Health Science Center at Houston was not guilty of sex bias when it refused to promote a female assistant professor of medicine to an associate professorship. The court ruled that the institution had produced adequate evidence that its decision was due to insufficient publication and teaching experience at the graduate level. The U.S. Supreme Court refused to reconsider the case.

A federal district judge ruled that Cornell University was not guilty of sex bias in denying tenure to five women who had been faculty members. The judge found the university's reasons for denial nondiscriminatory, ruling that the five women simply did not meet Cornell's rigorous standard for tenure.

In these recent decisions, sometimes the position of the college or university has been upheld and sometimes the complainant's position has been supported. Generalizations are therefore difficult. However, some trends are discernable. First, on a nationwide basis, the number of discrimination-based lawsuits against colleges and universities is increasing. Second, every public charge of discrimination brings on a spate of unpleasant publicity. And third, it is prudent for institutions to erase existing inequities in faculty evaluation systems if they hope to defend themselves successfully in court.

Constitutional Due Process

Not all legal conflicts between faculty and their institutions arise out of discrimination issues. Colleges and universities should also give full attention to due process. Constitutional due process involves following certain principles, such as providing faculty members with proper notice and an opportunity for a fair hearing. The application of due process to faculty evaluations is not simply desirable; it is a faculty member's right. Due process is provided to faculty members, as to all citizens, under the Fourteenth Amendment, which says that the states shall not deprive any person of life, liberty, or

Checklist for Faculty Evaluation Programs

References

Career outcomes in a matched sample of men and women Ph.D.'s (1981).